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BEFORE THE

Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D. C. 20554

In re Applications of)	MM Docket No. 92-62
CRYSTAL CLEAR COMMUNICATIONS, INC.)	File No. BPH-901214MA
THE RADIO MINISTRIES BOARD OF)	
VICTORY CHRISTIAN CENTER)	
ASSEMBLY OF GOD, INC.)	File No. BPH-901217MJ
For a Construction Permit for)	
a new FM Station on Channel 240A)	
Seelyville, Indiana)	

To: Administrative Law Judge John Frysiak

REPLY TO OPPOSITION TO MOTION TO ENLARGE ISSUES

The Radio Ministries Board of Victory Christian Center Assembly of God, Inc. ("Radio Board"), by counsel, herein submits its reply to the "Opposition to Motion to Enlarge Issues" ("Opposition") filed May 28, 1992 by Crystal Clear Communications, Inc. ("Crystal"). In reply, the following is stated:

Site Is Not Available. Radio Board demonstrated in its Motion to Enlarge Issues ("Motion") that the property upon which Crystal proposes to construct its transmitter site was sold nearly a year ago,¹ and development of that property for residential housing began eight months ago, in November 1991. Motion, Attachments C, D and E. Radio Board also showed that Crystal has never contacted the current property owners, Mr. and Mrs. Tarrh, or

¹ The deed transferring the property to Mark and Cathy Tarrh is dated July 4, 1991. Motion, Attachment C.

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the prior land owner, Don Shew. Id.² Crystal does not dispute those allegation or the fact that its proposed transmitter site is not available. Crystal admits that it is now looking for a new transmitter site.³ Thus, a site availability issue must be specified.

No Reasonable Assurance When It Certified. The circumstances of Crystal's original site certification are sketchy. Indeed, Crystal's Opposition raises as many questions as it answers.

Crystal does not claim that it ever contacted the landowner or the landowner's agent, Larry Helman. Rather, Lorie Shauntee, Crystal's president, states that (a) she contacted Brigitte Wassel, a Century 21 real estate agent, "with regard to the site selected;" (b) "[f]ollowing discussions with Ms. Wassel as to site availability" she discovered the property was for sale for \$60,000 and (c) she subsequently received a letter from Ms. Wassel confirming the property was for sale. Crystal Opposition, Exhibit 1.

² Additionally, Mr. Shew certified that his real estate agent, Larry Helman, had never told him about any contact by Crystal or anyone else seeking to buy his property for a transmitter site. Neither Ms. Shauntee nor Mr. Thompson claims to have contacted Larry Helman.

³ Crystal claims it will file an amendment specifying a new site in a "timely" manner. Crystal also alleges that it learned of the unavailability of the site at about the time the HDO was issued (mid-April 1992). To date, June 9, 1992, Radio has not received such an amendment. Radio Board will address the "timeliness" of the amendment when Crystal's petition for leave to amend is filed.

As Radio Board demonstrated in its Motion, Ms. Wassel was never the representative of Mr. Shew, the landowner. But Ms. Shauntee, who does not dispute that fact, does not say whether she was aware that Ms. Wassel had no relationship with the landowner. Radio Board also demonstrated that Ms. Wassel never contacted Mr. Shew to obtain reasonable assurance of the availability of his property as a transmitter site. But Ms. Shauntee, who also does not dispute that point, does not disclose whether she was aware Ms. Wassel had not made such a contact. In fact, Ms. Shauntee does not divulge the substance of her conversations with Ms. Wassel regarding the site's availability or the basis -- if any -- upon which she believed Ms. Wassel was authorized to provide a reasonable assurance of the availability of Mr. Shew's property.⁴ Indeed, Ms. Shauntee does not state outright that she did understand Ms. Wassel to have such authority. Rather, she states that the fact the property was for sale for \$60,000 was confirmed to her by Ms. Wassel's December 3, 1990 letter.⁵

⁴ Crystal also submits a declaration from its broadcast consultant, Charles Thompson, alleging Mr. Thompson "confirmed the arrangement between the applicant and the agent." Opposition, p. 2. Actually, Mr. Thompson's declaration does not even describe the arrangement." Mr. Thompson simply states that he spoke to Ms. Wassel and "after discussions with Ms. Wassel" related those conversations to Ms. Shauntee, suggesting she contact Ms. Wassel "for further discussions." Mr. Thompson does not relate the substance of his conversations with Ms. Wassel or otherwise indicate the basis upon which Ms. Wassel "made available" Crystal's proposed site. See Crystal Opposition, Exhibit 2.

⁵ Although, in its Opposition, p. 1, Crystal maintains that Ms. Wassel's December 3, 1990 letter -- which appears to be a "form" letter -- "set forth the terms and conditions of the sale of the property to Crystal Clear," the only "term" of sale described
(continued...)

In sum, it is undisputed that Brigitte Wassel had no authority to provide a reasonable assurance of the availability of Mr. Shew's property. Yet Crystal has not even attempted to address that point, refusing to reveal whether and why it determined Ms. Wassel did have such power. Indeed, from the few facts Crystal does provide, it is apparent that Crystal's certification of the "availability" of the Shew property was based merely upon it being listed for sale. Yet, as the Review Board made clear in Radio Delaware, Inc., 67 RR 2d 358, 360 (Rev. Bd. 1989),⁶ the fact a property is available for sale is insufficient to demonstrate the "meeting of the minds" necessary to constitute a "reasonable assurance." Thus, an applicant which had contacted the owner's agent and determined the property was for sale, but not contacted the property owner or sought an agreement, was remanded for site availability and false certification issues. Id. Here, Crystal did not even go that far, basing its assurance on an agent who has never represented the owner.

To demonstrate "reasonable assurance" there must be "some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for the use of the property as a transmitter site, on terms to be negotiated, and that he would give notice of any change of intention." Barry Skidelsky,

⁵(...continued)
in Wassel's letter is the sale price. (The letter does also note that Crystal is responsible for obtaining its own permits and authorizations.)

⁶ Motion for clarification dismissed, FCC 90R-2 (released January 18, 1990).

70 RR 2d 722, 732 (Rev. Bd. 1992) (citations omitted). Here, the landowner, Mr. Shew, was never contacted, nor has he even heard of the person Crystal identifies as his "agent," Brigitte Wassel. Thus, by no stretch of the imagination did Crystal meet the Commission's standards for demonstrating reasonable assurance of the availability of Mr. Shew's property as its transmitter site at the time it so certified. Indeed, Crystal's allegation that there was a "requisite meeting of the minds"⁷ is ludicrous, in light of the fact the owner of the property had no idea Crystal even existed! Two people who have no relationship whatsoever to the property or the property owner could not legitimately arrange for its disposition. Finally, Crystal has failed even to show that it acted in good faith when it allegedly relied upon Ms. Wassel as the source for providing a reasonable assurance. Accordingly, a false certification/ misrepresentation/candor issue must be specified.

Any "Assurance" Was Lost Upon Sale of the Property. Even assuming, arguendo, that Crystal had obtained a proper assurance of the availability of its proposed site in December 1990, such assurance indisputably was lost when the property was sold to Mark and Cathy Tarrh in July 1991.

Crystal does not dispute that the property was sold in mid-1991, but suggests it did not know about the sale until 1992. Again choosing to remain vague and uninformative, Ms. Shauntee does not identify, in her declaration, just when she first became aware of the sale. Ms. Shauntee does say that "at approximately the same

⁷ Opposition, p. 1.

time" Crystal's counsel checked on the status of Crystal's application with the FAA, the HDO was released and "upon advice" she visited the area of Crystal's proposed site "to determine the availability of other sites." Ms. Shauntee claims "[a]t that time, I discovered that there were alterations to the area of the site I specified." Ms. Shauntee states she could not reach Ms. Wassel, but "did discover" that Crystal's proposed tower site had been sold. Opposition, Ex. 1, pp. 1-2. Thus, it appears Ms. Shauntee is alleging she did not know about the sale of the Shew property until approximately mid-April 1992.

But other evidence demonstrates that is not the case. Specifically, on April 16, 1992, undersigned counsel for the Radio Board, Cheryl A. Kenny, contacted Richard Koch, an employee at the Great Lakes Region office of the Federal Aviation Administration ("FAA"), about the status of the Radio Board's proposal before the FAA. At that time, counsel also inquired as to the status of Crystal's proposal and was advised by Mr. Koch that Stanley Emert, Crystal's FCC counsel, told Mr. Koch in June 1991 that Crystal was abandoning its proposed site. See Declaration of Cheryl A. Kenny, attached hereto as Attachment A. Through a Freedom of Information Act ("FOIA") request, the Radio Board recently was able to obtain a copy of Mr. Koch's notes on his conversation with Mr. Emert.⁸ Those notes do indeed refer to a June 20, 1991 conversation between

⁸ Counsel had asked Mr. Koch to provide her with a copy of those notes on April 17, 1992, but Mr. Koch said he could not do so. Therefore, on May 7, 1992, Radio Board's counsel filed an FOIA request seeking such documents. The documents were received by counsel on May 22, 1992.

Mr. Koch and Mr. Emert regarding abandonment of Crystal's proposed transmitter site. The notes read "Abandonment letter coming from Stan Emert." See Attachment A, Exhibit No. 1. The late June 1991 timing of Crystal's representation that it was abandoning its site corresponds to the time when the Shew property was being sold to the Tarrhs.⁹

Furthermore, it is likely that Ms. Shauntee would have discovered the property was sold before mid-April 1992 since the property is located just outside the Terre Haute city limits, not more than 20 minutes away from Ms. Shauntee's residence.¹⁰ Had Ms. Shauntee driven by the property in the past eight months she would have seen that it was being developed, alerting her to the fact the property was no longer for sale.

Moreover, if Crystal did not check on the availability of its proposed site over the 16 months between December 1990 and April 1992, it should have. It was reasonably foreseeable that property for sale in December 1990 would be sold by 1992. Thus, in the event Crystal did not keep in touch with Ms. Wassel¹¹ or otherwise check periodically on the availability of the Shew property during those months, it did not exercise the reasonable due diligence expected of Commission applicants.

⁹ The deed transferring the property to the Tarrhs was executed July 4, 1991.

¹⁰ See Attachment B hereto, Declaration of Janice Bender.

¹¹ Ms. Shauntee does not specifically state whether she contacted Ms. Wassel after December 1990, but since candor would require that such contacts be divulged, it can be concluded that she did not.

Conclusion. It is undisputed that Crystal's currently proposed transmitter site is unavailable, warranting specification of a site availability issue must be added.

It also is clear that at the time it specified the Shew property as its transmitter site Crystal did not, in fact, have reasonable assurance of the availability of that property for construction of its tower, rendering its certification false. Having failed to demonstrate that its certification was made in good faith, failing to even touch on its reason for allegedly concluding Brigitte Wassel was authorized to make the property reasonably available, a false certification/misrepresentation/candor issue also is warranted.

Finally, a serious question is raised as to when Crystal first learned the Shew property was no longer for sale. While suggesting it first became aware of the sale in April 1992, it told the FAA in June 1991 -- when the property was under contract for sale -- that it was abandoning that site. That fact, plus the property's location no more than 20 minutes from Ms. Shauntee's residence, indicate Crystal knew long ago that the property was unavailable. Yet, it failed to advise the Commission of that fact. Those circumstances provide an independent basis for specification of a false certification/misrepresentation/candor issue.

9.

WHEREFORE, In light of the foregoing, the Radio Board's Motion to Enlarge Issues should be GRANTED and site availability and false certification/misrepresentation/candor issues sought therein should be SPECIFIED against Crystal Clear Communications, Inc.

Respectfully submitted,

THE RADIO MINISTRIES BOARD
OF VICTORY CHRISTIAN CENTER
ASSEMBLY OF GOD, INC.

By Harry C. Martin 
Harry C. Martin

By Cheryl A. Kenny
Cheryl A. Kenny
Its Counsel

Reddy, Begley & Martin
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20554

June 9, 1992

ATTACHMENT A

DECLARATION OF CHERYL A. KENNY

DECLARATION OF CHERYL A. KENNY

I, Cheryl A. Kenny, do hereby certify and state, under penalty of perjury, that the following is true and correct:

I am a partner with Reddy, Begley & Martin, which represents the Radio Ministries Board of Victory Christian Assembly of God, Inc. (the "Radio Board") in its quest for a new FM broadcast station at Seelyville, Indiana. On April 16, 1992, I contacted Richard Koch, with the Great Lakes Region office of the Federal Aviation Administration ("FAA"), to check on the status of the Radio Board's proposal. At that time, I also inquired as to the status of the competing proposal of Crystal Clear Communications, Inc. ("Crystal"). I was advised by Mr. Koch that Crystal, through its FCC attorney, Stanley Emert, had told him, in June 1991, that Crystal was abandoning its proposed site, and would send the FAA a letter affirming that fact. Mr. Koch told me that was the last contact he had had with Crystal.

On April 17, 1992, I again spoke to Mr. Koch and asked him to send me a copy of his notes regarding his conversation with Mr. Emert. Mr. Koch said he could not do so. Therefore, by letter dated May 7, 1992, Reddy, Begley & Martin filed a Freedom of Information Act request with the FAA asking for a copy of the documents relating to Crystal's proposal, including Mr. Koch's notes. In response to that request, by letter dated May 19, 1992, the FAA produced certain documents, including Mr. Koch's notes on his conversations with Mr. Emert regarding Crystal. Those notes include an entry dated June 20, 1991 stating "Abandonment letter coming from Stan Emert." See Exhibit No. 1 hereto (copy of FAA letter and notes produced by FAA).

Executed this 9th day of June, 1992.

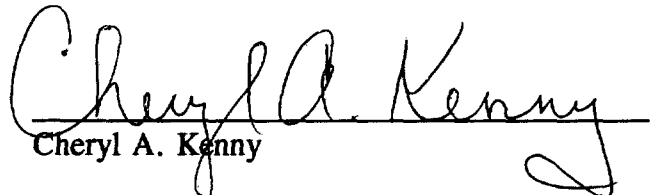

Cheryl A. Kenny

Exhibit No. 1

FAA Letter and Notes Produced by FAA



U.S. Department
of Transportation
**Federal Aviation
Administration**

MAY 19 1992

Mr. Andrew S. Kersting
Reddy, Begley & Martin
1001 22nd Street, NW
Suite 350
Washington, DC 20037

Dear Mr. Kersting:

We have received your letter dated May 7, 1992, requesting Aeronautical Study
No. 90-AGL-2287-OE.

The information requested is enclosed. The fee for this data is minimal and
is waived.

This request has been processed under Freedom of Information Act document
control number AGL-5-92-317.

Sincerely,

John P. Cuprisin
John P. Cuprisin
Manager, Air Traffic Division

Enclosure

Great Lakes Region
Illinois, Indiana, Michigan,
Minnesota, North Dakota,
Ohio, South Dakota,
Wisconsin

2300 East Devon Avenue
Des Plaines, Illinois 60018

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REDDY, BEGLEY & MARTIN

MAY 22 1992

Addressed to _____
Handled by _____
File _____

Call FAF 19

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avoid circling,

talked to ~~the~~

Stanley Emeott.

4-11-91

hx

4-24-91 left message

6-20-91 Abandonment letter
coming for Star Ernest,
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ATTACHMENT B

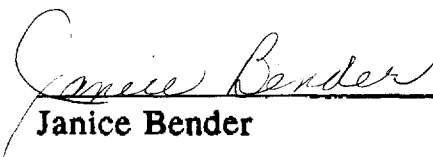
DECLARATION OF JANICE BENDER

DECLARATION OF JANICE BENDER

I, Janice Bender, do hereby certify and state, under penalty of perjury, that the following is true and correct to the best of my knowledge and belief:

I am a long-time resident of Terre Haute, Indiana and I am personally familiar with the Terre Haute area. The property proposed by Crystal Clear Communications, Inc. ("Crystal") as its transmitter site is located about .2 miles north of Gospel Grove, Indiana, in Vigo County, Indiana. Gospel Grove is a small community located approximately two to three miles east of the city limits of Terre Haute. The residence of Lori M. Shauntee as reflected in Crystal's December 1990 FCC application, 1407 South Eighth Street, Terre Haute, Indiana, is approximately 15 to 20 minutes driving time from that transmitter site.

Executed this 5th day of June, 1992.



Janice Bender

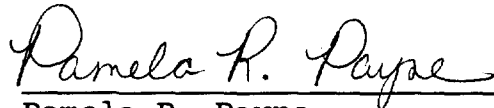
CERTIFICATE OF SERVICE

I, Pamela R. Payne, hereby certify that on this 9th day of June, 1992, copies of the foregoing **REPLY TO OPPOSITION TO MOTION TO ENLARGE ISSUES** were hand delivered or mailed, first class, postage prepaid, to the following:

Administrative Law Judge John M. Frysiak *
Federal Communications Commission
2000 L Street, N.W., Room 233
Washington, D.C. 20554

Robert Zauner, Esquire *
Hearing Branch, Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7212
Washington, D.C. 20554

Stanley G. Emert, Jr., Esquire
Law Office of Stanley G. Emert, Jr.
2318 Second Avenue, Suite 845
Seattle, Washington 98121
Counsel for Crystal Clear Communications, Inc.



Pamela R. Payne

* HAND DELIVERED